

Chapter 15

LEGAL ISSUES

I. Administrative Subpoenas.

A. When to Issue.

An Administrative Subpoena may be issued whenever there is a need for records, documents, testimony or other supporting evidence necessary for completing an inspection or an investigation of any matter falling within OSHA's authority.

B. Two Types of Subpoenas.

There are two types of subpoenas used to obtain evidence during an OSHA investigation:

1. A *Subpoena Duces Tecum* is used to obtain documents. It orders a person or organization to appear at a specified time and place and produce certain documents, and to testify to their authenticity. Employers are not required to create a new record in order to respond to these types of subpoenas.
2. A *Subpoena* may command a named individual or corporation to appear at a specified time and place, such as at the office, to provide testimony under oath.

C. Authority to Issue Administrative Subpoenas.

1. The Labor Commissioner, Iowa OSHA Administrator, and the Labor Commissioner's attorneys may issue administrative subpoenas for any record or document relevant to an inspection or investigation under the Act, including but not limited to:
 - a. Injury and illness records such as the OSHA-301 and the OSHA-300;
 - b. Hazard communication program;
 - c. Lockout/tagout program; and
 - d. Safety and health program.

- e. Medical or exposure records; and
 - f. Physical evidence, such as samples of materials.
- 2. Information shall be requested from the employer or holder of records, documents, or other information-containing materials.
 - a. If this person/entity refuses to provide requested information or evidence, the OSHA representative serving the subpoena shall explain the reason for the request.
 - b. If there is still a refusal to produce the information or evidence requested, the OSHA representative shall inform the person/entity that the agency may take further legal action.
 - 3. The official issuing the subpoena is responsible for evaluating the circumstances and deciding whether to issue a subpoena.

D. Administrative Subpoena Content and Service.

- 1. Blank administrative subpoenas for use by the CSHOs are provided at the end of this chapter.

The subpoena shall be prepared for the appropriate party and will normally be served by personal service (delivery to the party named in person). Leaving a copy at a place of business or residence is not personal service. Where no individual's name is available, the subpoena can be addressed to a business' or organization's "Custodian(s) of Records."

- 2. Examples of language for a routine *Subpoena Duces Tecum* are provided below. This language should be expanded when requesting additional or more detailed information for accident, catastrophe, referral or fatality investigations.
 - a. "Copies of any and all documents, including information stored electronically, which reflect training procedures for the lockout/tagout procedures and hazard communication program in effect at the [insert site name] in [insert city, state], during the period [insert month/day/year], to present."
 - b. "Copies of the OSHA-300 and the OSHA-301 forms, for the entire site, during calendar years [insert year] and [insert year]."

- c. "Copies of any and all documents, including information stored electronically, such as safety and health program handbooks, minutes of safety and health meetings, training certification records, audits and reprimands for violations of safety and health rules by employees of the *[insert site name]* in *[insert city, state]*, that show *[insert employer's name]* had and enforced safety rules relating to the use of trench boxes during the period *[insert month/day/year]*, to present."

NOTE: Where particular information is being sought, a subpoena's description should be narrow and specific in order to increase the likelihood for prompt compliance with the request.

3. A copy of the subpoena shall be placed in the case file with proof of service.

E. Compliance with the Subpoena.

The person/entity served may comply with the subpoena by making the information or evidence available to the compliance officer immediately upon service, or at the time and place specified in the subpoena.

1. With respect to any record required to be made or kept pursuant to any statute or regulation, the subpoena shall normally allow **three days** from the date of service for production of the required information although a shorter period may be appropriate.
2. With respect to other types of records or information, such as safety programs or incident reports, the subpoena shall normally allow at least **seven days** from the date of service for production of the required information.

F. Refusal to Honor Subpoena.

1. If the person/entity served refuses to comply with (or only partially honors) the subpoena, the compliance officer shall document all relevant facts and advise the legal staff before taking further action.
2. To enforce a subpoena, the legal staff may follow the procedures outlined for contempt of court.

G. Anticipatory Subpoena.

Generally, agency policy is to seek voluntary production of evidence before an administrative subpoena is issued. However, a subpoena may be executed and served without making a prior request where there is reason to believe that the corporate entity and/or person from whom information is sought will not voluntarily comply, or where there is an urgent need for the information. Anticipatory subpoenas require consultation with the Legal Staff.

NOTE: For example, pre-inspection preparation of subpoenas for issuance at the opening conference is appropriate in cases where the employer has previously denied access to records or where complex inspections, involving extensive review of records, are planned.

II. Service of Subpoena on OSHA Personnel.

A. Proceedings to which the Labor Commissioner is a Party.

If any Iowa OSHA personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding where the Labor Commissioner is a party, he or she shall immediately contact the legal staff for instructions regarding the manner in which to respond. If a CSHO is served with a subpoena, the legal staff shall be notified immediately.

B. Proceedings to which the Labor Commissioner is Not a Party.

1. If any OSHA personnel is served with a subpoena or order either to appear or to provide testimony in, or information for, a proceeding to which the Labor Commissioner is not a party (e.g., a private third party tort suit for damages associated with a workplace injury), he or she shall immediately contact the legal staff.
2. The legal staff is responsible for responding to such requests and will take appropriate steps to have the subpoena quashed or provide the necessary response to allow an employee to comply with an issued order.

III. Obtaining Warrants.

A. Warrant Applications.

Upon refusal of entry, or if there is reason to believe an employer will refuse entry, the CSHO shall proceed according to guidelines and procedures established for warrant applications.

B. General Information Necessary to Obtain a Warrant.

If a warrant is to be obtained, the CSHO shall inform the legal staff in writing to provide all information necessary to obtain a warrant, including:

1. Name of CSHO attempting inspection and inspection number, if assigned. Identify whether the inspection to be conducted will include safety items, health items or both;
2. Legal name(s) of establishment and address, including city, state and county. Include site location if different from mailing address;
3. Estimated number of employees at inspection site;
4. North American Industry Classification System (NAICS) Code and high hazard ranking for that specific industry within the State, as obtained from statistics provided by the National Office;
5. Summary of all facts leading to the refusal of entry or limitation of inspection, including:
 - a. Date and time of entry/attempted entry;
 - b. Date and time of denial;
 - c. Stage of denial (entry, opening conference, walkaround, etc.);
6. A narrative of all actions taken by the CSHO leading up to, during, and after refusal, including:
 - a. Full name and title of the person(s) to whom CSHO presented credentials;
 - b. Full name and title of person(s) who refused entry;
 - c. Reasons stated for the denial by person(s) refusing entry;
 - d. Response, if any, by CSHO to the denial name and address (if known) of any witnesses to denial of entry.
7. Any information related to past inspections, including copies of previous citations.
8. Any previous requests for warrants. Attach details, if applicable.

9. All completed information related to the current inspection report, including documentation of any observations of violations in plain view discovered prior to denial.
10. If it is a construction site involving work under contract from any agency of the Federal or State Government, the name of the agency, the date of the contract, and the type of work involved.
11. Other pertinent information, such as: description of the workplace; the work processes; machinery, tools and materials used; known hazards and injuries associated with the specific manufacturing process or industry.
12. Investigative procedures that may be required during the proposed inspection, e.g., interviewing of employees/witnesses, personal sampling, photographs, audio/videotapes, examination of records, access to medical records, etc.

Note: Appendix D “*Instructions for Serving Inspection Warrants*” is contained in this chapter and is to be used by the CSHO for guidance when serving warrants.

C. Specific Warrant Information Based on Inspection Type.

Document all specific reasons for the selection of the establishment to be inspected, including proposed scope of the inspection:

1. **Imminent Danger.**
 - a. Description of alleged imminent danger situation;
 - b. Date information received and source of information;
 - c. Original allegation and copy of typed report, including basis for reasonable expectation of death or serious physical harm and immediacy of danger; and
 - d. Whether all current imminent danger investigative procedures have been followed.
2. **Fatality/Catastrophe.**

The OSHA Fatality/Catastrophe Report form should be completed in detail.
3. **Complaint or Referral.**

- a. Original complaint or referral and copy of typed complaint or referral;
 - b. Reasons OSHA believes that a violation threatening physical harm or imminent danger exists, including possible standards that could be violated if the complaint or referral is credible and representative of workplace conditions;
 - c. Whether all current complaint or referral processing procedures have been followed; and
 - d. Any additional information pertaining to the evaluation of the complaint or referral.
4. **Programmed.**
- a. Targeted safety – general industry, agriculture, construction;
 - b. Targeted health; and/or
 - c. Special emphasis program--Special Programs, Local Emphasis Program, etc.
5. **Follow-up.**
- a. Date of initial inspection;
 - b. Details and reasons follow-up was conducted;
 - c. Copies of previous citations which served as the basis for initiating the follow-up;
 - d. Copies of settlement agreements and final orders, if applicable; and/or
 - e. Previous history of failure to correct, if any.
6. **Monitoring.**
- a. Date of original inspection;
 - b. Details and reasons monitoring inspection is to be conducted;
 - c. Copies of previous citations and/or settlement agreements that serve as the basis for the monitoring inspection; and/or

- d. Petition for Modification of Abatement Date (PMA) request, if applicable.

D. Warrant Procedures.

Where a warrant has been obtained, CSHOs are authorized to conduct the inspection in accordance with the terms of the warrant. All questions from employers concerning the reasonableness of a compulsory process inspection shall be referred to the legal staff.

1. Action Taken Upon Receipt of Warrant (Compulsory Process).

- a. The inspection will normally begin within 24 hours of receipt of a warrant.
- b. CSHOs shall complete the return of service, sign and forward it to the legal staff for appropriate action. The CSHO shall keep a copy of the warrant, application, and return of service in the case file.

E. Second Warrant.

Under certain circumstances, a second warrant may be sought to expand an inspection based on a records review or "plain view" observations of other potential violations discovered during a limited scope walkaround.

F. Refused Entry or Interference.

1. When an apparent refusal to permit entry or inspection is encountered upon presenting the warrant, CSHOs shall specifically inquire whether the employer is refusing to comply with the warrant.
2. If the employer refuses to comply or if consent is not clearly given, CSHOs shall not attempt to conduct the inspection at that time, and shall leave the premises and contact the legal staff regarding further action.
 - a. CSHOs shall fully document all facts relevant to the refusal (including noting all witnesses to the denial of entry or interference).

G. County Sheriff/Police Assistance.

A county Sheriff or police officer may be asked to accompany a CSHO when a warrant is presented if there is a potential for violence, harassment and/or interference with the inspection, or if there is reason to believe that the presence of a Sheriff's Officer or Police Officer will assist with compliance with the warrant.

IV. Notice of Contest.

The Employment Appeal Board is an independent state board created to decide contests of citations or penalties resulting from OSHA inspections. The Employment Appeal Board functions as an administrative court, with established procedures for conducting hearings, receiving evidence and rendering decisions.

A. Time Limit for Filing a Notice of Contest.

1. The Act provides employers fifteen working days following its receipt of a notice of a citation to notify OSHA that it chooses to contest a citation and/or proposed assessment of penalty. All Notices of Contest shall be delivered to legal staff immediately upon receipt.

B. Communication Where the Intent to Contest is Unclear.

1. If a written communication is received from an employer containing an objection, criticism or other adverse comment as to a citation or proposed penalty, forward such communication to legal staff immediately.
 - a. After receipt of the communication, any clarification should be obtained within the 15 working day contest period, so that if a determination is made that it is a notice of contest, the file may be timely forwarded to the Employment Appeal Board.
 - b. In cases where the office receives a written communication from an employer requesting **an informal conference that also states an intent to contest**, the employer must be informed that there can be no informal conference unless the notice of contest is withdrawn. If the employer still wants to pursue an informal conference, it must first present or send a letter expressing that intent and rescinding the contest. All documents pertaining to such communications shall be retained in the case file.
2. If the legal staff determines that the employer intends the document to be a notice of contest, it shall be transmitted to the Employment Appeal Board. If contact with the employer reveals a

desire for an informal conference, the employer shall be informed that the conference does not stay the running of the 15 working day contest period.

NOTE: Settlement is permitted at any stage of Employment Appeal Board proceedings.

V. Late Notice of Contest.

A. Failure to Notify OSHA of Intent to Contest.

If the employer fails to notify OSHA of its intent to contest a citation or penalty within fifteen working days following the receipt of a citation, the citation and proposed penalties become a final order of the Employment Appeal Board.

B. Notice Received after the Contest Period.

In every case where OSHA receives notice of an employer's intent to contest a citation and/or proposed assessment of penalty beyond the 15 working day period, IOSHA will transmit the late filed notice of contest to the Employment Appeal Board for disposition.

NOTE: The postmarked envelope containing the late filed notice of contest date is to be retained in the casefile. A copy of the letter and envelope shall be sent to Employment Appeal Board.

C. Retention of Documents.

1. Iowa OSHA shall maintain all documents reflecting the date on which the employer received the notice of a violation (and proposed penalty, if applicable), and the employer's notice of contest was received, as well as any additional information pertinent to demonstrate failure to file a timely notice of contest.
2. Written or oral statements from the employer or its representative explaining the employer's reason for missing the filing deadline shall also be maintained (notes shall be taken to memorialize oral communications).

VI. Contested Case Processing Procedures.

The notice of contest and related documents must be sent to the Employment Appeal Board within 7 days of receipt of the employer's notification. See [Iowa Administrative Code 486-4.32](#).

A. Transmittal of Notice of Contest to the Employment Appeal Board.

1. Documents to Employment Appeal Board.

In most cases, the envelope sent to the Employment Appeal Board will contain the following three documents:

- a. Employer's original letter contesting OSHA's action;
- b. One copy of the Citation and Notification of Penalty Form (OSHA-2) or of the Notice of Failure to Abate Form (OSHA-2B); and
- c. Transmittal cover sheet.

2. Notices of Contest.

The original notice of contest shall be transmitted to the Employment Appeal Board and a copy retained in the case file. The envelope containing the notice of contest shall be retained in the case file with the postmark intact.

3. Contested Citations and Notice of Proposed Penalty or Notice of Failure to Abate.

A signed copy of each of these documents shall be sent to the Employment Appeal Board and a copy retained in the case file.

4. Transmittal Sheet.

- a. The documents are to be transmitted within the 7 day time limit to:

Employment Appeal Board
4th Floor Lucas State Office Building
321 East 12th Street
Des Moines, Iowa 50319

B. Transmittal of Complaint to Employment Appeal Board.

- 1. Under the Employment Appeal Board rules, the Labor Commissioner is required to file a complaint with the Employment Appeal Board within **20 calendar days** after the Labor Commissioner's receipt of a notice of contest. See [IAC 486-4.33\(1\)\(a\)](#).

VII. Communications while Proceedings are Pending before the Board.

A. Consultation with Legal Staff.

1. After a notice of contest is filed and the case is within the jurisdiction of the Employment Appeal Board, there shall be no subsequent investigations of, or conferences with, the employer or employee representatives that have sought party status relating to any issues underlying the contested citations without legal staff's approval.
2. Once a notice of contest has been filed, all inquiries relating to the Citation and Notification of Penalty shall be referred promptly to the legal staff. This includes inquiries from the employer, affected employees, employee representatives, prospective witnesses, insurance carriers, other government agencies, attorneys, and any other party.

B. Communications with the Board's Representatives while Proceedings are Pending before the Board.

CSHOs, Administrators, or other field personnel shall not have any direct or indirect communication relevant to the merits of any open case with Administrative Law Judges, employees of the Board, or any of the parties or interveners. All inquiries and communications shall be handled through the legal staff.

VIII. Employment Appeal Board Procedures.

A. Two Levels of Adjudication.

Employment Appeal Board Rules of Procedure provide for two levels of adjudication. The first level is before an Administrative Law Judge. The second level is review of ALJ decisions by the agency's Board Members.

B. Rules of Procedure.

1. The Employment Appeal Board Rules of Procedure are found in [IAC 486 Chapter 4](#).

2. **Receipt of Case.**

Upon receipt of a case by the assigned ALJ a prehearing will be conducted, during which a hearing date will be set. The hearing is

an administrative hearing conducted in accordance with the Employment Appeal Board's rules of procedure.

3. **Hearing Evidence.**

- a. Review includes an examination of all of the evidence, and possibly briefs submitted by the parties.
- b. Upon hearing all of the evidence, the judge will issue a written proposed decision, including both findings of fact and conclusions of law.
- c. The decision becomes a final order of the Employment Appeal Board in **30 days** unless, within that period, a party appeals to the Employment Appeal Board.

4. **Review of Employment Appeal Board's Decision.**

If one of the parties requests review of the Employment Appeal Board's decision, they must file a petition for Judicial Review in District Court per [Iowa Code 17A](#) within **60 days** after the Employment Appeal Board's decision becomes final.

5. **Availability of Employment Appeal Board Decisions.**

Employment Appeal Board decisions, including Administrative Law Judge decisions, are available from the Employment Appeal Board in book form.

IX. Discovery Methods.

Once a legal proceeding has been initiated, each party has the opportunity to "discover" evidence in the possession of an opposing party. Discovery methods include:

- Request for Admissions,
- Interrogatories,
- Requests for Production of Documents, and
- Depositions.

An attorney from the legal staff will represent the agency in responding to discovery requests. It is essential that all OSHA personnel coordinate and cooperate with the assigned attorney to ensure that such responses are accurate, complete, and filed in a timely manner.

A. Interrogatories.

CSHOs shall review and sign answers to interrogatories with legal staff assistance. It is the responsibility of the CSHO to answer each interrogatory separately and fully. The legal staff shall make any objections to the interrogatories. CSHOs should be aware that they may be deposed and/or examined at hearing on the interrogatory answers provided.

B. Production of Documents.

1. If a request for production of documents is received all documents relevant to that discovery demand must be made available to the legal staff.
2. CSHOs must not withhold any information from the legal staff. This includes all electronic documents.
3. It is legal staff's responsibility to review all material and to assert any applicable privileges that may justify withholding documents/materials that would otherwise be discoverable.

C. Depositions.

Depositions permit an opposing party to take a potential witness' pre-hearing statement under oath in order to better understand the witness's potential testimony if the matter later proceeds to a hearing. CSHOs or other OSHA personnel may be required to offer testimony during a deposition. In such cases, a legal staff attorney will be present with the witness.

X. Testifying in Hearings.

While instructions provided by attorneys take precedence, particularly during trial preparation, the following considerations will generally enhance the hearing testimony of CSHOs:

A. Review Documents and Evidence.

In consultation with legal staff, CSHOs should review documents and evidence relevant to the inspection or investigation before the proceeding so that, when testifying, they are very familiar with the evidence and need not regularly refer to the file or other documents.

B. Attire.

Wear appropriate clothing that reflects the agency's respect for the court or other tribunal before which you are testifying.

C. **Responses to Questions.**

Answer all questions directly and honestly. If you do not understand a question, indicate that and ask that the question be repeated or clarified.

D. **Judge's Instruction(s).**

Listen carefully to any instruction provided by the judge and, unless instructed to the contrary by legal staff, follow the judge's instruction.

XI. Citation Final Order Dates.

A. **Citation/Notice of Penalty Not Contested.**

The Citation/Notice of Penalty and abatement date becomes a final order of the Employment Appeal Board **on the date the 15 working day contest period expires**. For purposes of computing the 15 working day period, the day the employer receives the citation is not counted.

Example 15-1: An employer receives the Citation/Notice of Penalty on August 4th. The day the employer receives the Citation/Notice of Penalty is not counted. Therefore, the final order date would be August 25th.

B. **Citation/Notice of Penalty Resolved by Informal Settlement Agreement (ISA).**

Because there is no contest of the citation, an ISA becomes final, with penalties due and payable, **on the date of the last signature of the parties**. See also [Chapter 8, Paragraph I.B.2.](#) (An ISA is effective upon signature by both the Iowa OSHA Representative and the employer representative as long as the contest period has not expired).

NOTE: A later due date for payment of penalties may be set by the terms of the ISA.

C. **Citation/Notice of Penalty Resolved by Formal Settlement Agreement (FSA).**

The Citation/Notice of Penalty becomes a Final Order of the Employment Appeal Board on the date specified on the Final Order.

D. **Cases Resolved by an ALJ Decision.**

The ALJ's decision **becomes a final order on the date specified on the Employment Appeal Board's Final Order.** The Employment Appeal Board's decision is a Final Order on the date specified on the Final Order.

E. Employment Appeal Board Decision Review by the District Court.

The District Court's decision becomes final when the court issues its decision.

XII. Enforcement of a Citation/Notice of Penalty.

A. Employer's Obligation.

An employer's obligation to abate a cited violation arises when there is a final order of the Employment Appeal Board upholding the citation.

B. Petition for Enforcement.

[Iowa Code 88.9\(2\)](#) authorizes OSHA to obtain a summary enforcement order from the appropriate District Court enforcing final Employment Appeal Board orders.